INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Specification of errors to be urged	5
Summary of argument	6
Argument:	
I. The Filled Milk Act is an appropriate exercise of the power of congress over interstate commerce	8
II. The Filled Milk Act does not violate the fifth amendment	18
Conclusion	30
Appendix A:	
House committee report	31
Senate committee report	46
Appendix B:	
State legislation	60

CITATIONS

Cases:	
Bailey v. *Drexel Furniture Co.*, 259 U. S. 20	10
Brooks v. *United States*, 267 U. S. 432	10, 13
Caminetti v. *United States*, 242 U. S. 470	12
Capital City Dairy Co. v. *Ohio*, 183 U. S. 238	29
Carolene Products Co. v. *Banning*, 131 Nev. 429	21
Carolene Products Co. v. *Carter*, Supreme Court of Pennsylvania, not yet reported	22
Carolene Products Co. v. *Evaporated Milk Assn.*, 98 F. (2d) 202	6, 10, 25
Carolene Products Co. v. *McLaughlin*, 365 Ill. 62	21
Carolene Products Co. v. *Thomson*, 276 Mich. 172	21
Champion v. *Ames*, 188 U. S. 321	12
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311	12
Gooch v. *U. S.*, 297 U. S. 124	13
Hamilton v. *Kentucky Distilling Co.*, 251 U. S. 146	16
Hammer v. *Dagenhart*, 247 U. S. 251	10, 16

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 640

THE UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court filed an opinion sustaining a demurrer to the indictment on October 19, 1937 (R. 6). This opinion adopts and applies to the instant case the opinion of District Judge Fitz Henry in the case of *United States* v. *Carolene Products Company*, 7 Fed. Supp. 500.

JURISDICTION

The judgment of the District Court was entered on October 19, 1937 (R. 6, 7). The appeal was prayed and allowed on November 18, 1937 (R. 8, 9).

The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682).

Probable jurisdiction was noted by this Court on January 3, 1938.

QUESTION PRESENTED

Whether the District Court erred in sustaining a demurrer to the indictment on the ground that the Filled Milk Act of March 4, 1923, is unconstitutional.

STATUTE INVOLVED

The Act of March 4, 1923, chapter 262, 42 Stat. 1486–7; United States Code, Title 21, Sections 61–63, hereinafter referred to as The Filled Milk Act, provides as follows:

> SECTION 61. Filled milk; definitions. Whenever used in sections 62 and 63 of this title—
>
> (a) The term "person" includes an individual, partnership, corporation, or association;
>
> (b) The term "interstate or foreign commerce" means commerce (1) between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; (2) between points within the same State, Territory, or possession, or within the District of Columbia, but through any place outside thereof; or (3) within any Territory or possession, or within the District of Columbia; and

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. This definition shall not include any distinctive proprietary food compound not readily mistaken in taste for milk or cream or for evaporated, condensed, or powdered milk, or cream where such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists, orphan asylums, child-welfare associations, hospitals, and similar institutions and generally disposed of by them (Mar. 4, 1923, c. 262, sec. 1, 42 Stat. 1486).

SECTION 62. Same; manufacture, shipment, or delivery for shipment in interstate or foreign commerce prohibited. It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to

the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk (Mar. 4, 1923, c. 262, sec. 2, 42 Stat. 1487).

SECTION 63. Same; penalty for violations of law; acts, omissions, and so forth, of agents. Any person violating any provision of sections 61 and 62 of this title shall upon conviction thereof be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both. When construing and enforcing the provisions of said sections, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure, of such individual, partnership, corporation, or association, as well as of such person (Mar. 4, 1923, c. 262, sec. 3, 42 Stat. 1487).

STATEMENT

On June 19, 1935, the appellee corporation was indicted in the United States District Court for the Southern District of Illinois, Southern Division (R. 1). The indictment is in two counts. The first count alleges that on December 1, 1934, the appellee, Carolene Products Company, a corporation, unlaw-

fully shipped in interstate commerce from Litchfield, Illinois, to the General Grocer Company, at the City of St. Louis, Missouri, an adulterated article; to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The second count alleges a shipment to a different consignee on another date.

On June 26, 1935, the appellee filed a motion to quash the indictment on the ground, among others, that the matters and facts set out in the indictment are res judicata (R. 3, 4). The District Court overruled this motion on July 7, 1937 (R. 4).

On July 12, 1937, a demurrer to the indictment attacking the constitutionality of the Filled Milk Act was filed by the appellee corporation (R. 5), which demurrer was sustained for the reasons assigned in the opinion of Judge FitzHenry, reported in 7 Fed. Supp. 500. After judgment of the court sustaining the demurrer was entered on October 19, 1937, the United States, on November 18, 1937, filed a petition for appeal, assignment of errors, and statement of jurisdiction with the District Court (R. 7, 8). On the same day the District Court signed the order allowing appeal (R. 8, 9). On November 29, 1937, the appellee filed a motion to dismiss the appeal. On January 3, 1938, this Court noted probable jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

1. That the Court committed material error against plaintiff in sustaining the demurrer of the

defendant, Carolene Products Company, a corporation, to each and every count of the indictment.

2. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional.

3. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States, under which each count of the indictment is drawn, is unconstitutional as contravening the due process clause of the Fifth Amendment.

4. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional as a regulation of matters within the jurisdiction of the various States under the guise of regulating interstate commerce.

SUMMARY OF ARGUMENT

The Filled Milk Act is an appropriate exercise of the power of Congress over interstate commerce. The Circuit Court of Appeals for the Seventh Circuit, to which the present case would have gone had an appeal lain to an intermediate court, so held after the decision of the court below was rendered. *Carolene Products Co.* v. *Evaporated Milk Association,* 93 F. (2d) 202. The power of Congress is not limited to prohibition of the shipment of articles which are noxious in character. *Kentucky*

Whip and Collar Co. v. *Illinois Central Railroad Co.*, 299 U. S. 334. While recognizing that the ingredients of filled milk are not in themselves unwholesome, Congress has recognized and declared that filled milk is injurious to the public health and its sale constitutes a fraud upon the public. The basic facts underlying this conclusion are that filled milk is designed as a substitute for whole milk; that the extraction of the butter fat from whole milk in the manufacture of filled milk removes virtually all of the vitamin A content of the milk, which is of major importance in the human diet as a growth-producing and disease-preventing element; and that the substitution of vegetable fat, such as coconut oil, for the butter fat makes filled milk identical with evaporated or condensed whole milk in color, consistency, and taste, the difference requiring expert analysis to detect. In view of the findings of Congress, the case is one for the application of the familiar doctrine that Congress may prohibit the interstate shipment of articles in order to prevent the spread of harm and deception among the people of the several States. The Filled Milk Act is essentially an amendment to the Pure Food and Drugs Act.

The Act does not violate the Fifth Amendment. This question is, we submit, concluded by the decision of this Court in *Hebe Co.* v. *Shaw*, 248 U. S. 297. That decision sustained a statute of Ohio which was applied to prohibit the sale of filled milk even though it was not found to be a noxious article and

even though it was properly labeled. At the time of the passage of the Federal statute, 11 States had prohibited or effectively controlled the local sale of filled milk. At the present time more than 30 States have enacted legislation specifically directed against the sale of filled milk. Although the validity of the Federal Act in so far as the Fifth Amendment is concerned could hardly be challenged in the light of the widespread opinion reflected in this state legislation, Congress itself, through its committees, made an independent investigation of the subject. The conclusions reached are embodied in the reports of the committees, printed as Appendix A, *infra*, pp. 31–46. The necessity of prohibiting the shipment of filled milk in order to protect the public health and to prevent the substitution of an imitation product for whole milk by reason of fraud or ignorance, is at most a debatable question. No showing has been attempted, nor could a showing be made in the face of the expert testimony adduced at the Congressional hearings, that the findings of Congress are without support in fact. It follows that the legislative judgment should be sustained.

ARGUMENT

I

THE FILLED MILK ACT IS AN APPROPRIATE EXERCISE OF THE POWER OF CONGRESS OVER INTERSTATE COMMERCE

The respondent by its demurrer concedes that the compounds trade marked "Milnut" and "Caro-

lene," named in the indictment, are filled milk within the definition of the Act of March 4, 1923, *supra,* p. 2. The only question presented, therefore, is the constitutional validity of the Act.

Filled milk, as defined in the statute and as described in the Committee reports of Congress, *infra,* pp. 32–48, is an imitation of condensed or evaporated whole milk made by extracting butter fat from whole milk and substituting therefor a fat such as coconut oil. The skimmed milk is reduced by evaporation to about half its bulk, and there is added from 6 to 8 per cent of coconut fat. The resulting mixture is an exact imitation of evaporated or condensed whole milk. It has the same consistency, the same color, and the same taste; the difference in the two products can be detected only by an expert or by chemical analysis. (See Senate Committee Report, *infra,* p. 49; House Committee Report, *infra,* p. 32.)

The District Court held, on the authority of a prior District Court decision, that Congress is without power to prohibit the shipment of filled milk in interstate commerce.[1] It may be observed at the outset that if an appeal had lain from the decision of the court below to the Circuit Court of Appeals, the decision of the District Court would have been

[1] The prior decision, *United States* v. *Carolene Products Co.*, 7 F. Supp. 500, was not appealed by the United States because the case arose on an information, and the sustaining of a demurrer thereto is not appealable under the Criminal Appeals Act.

reversed. After the decision of the District Court was rendered, and shortly after an appeal to this Court was allowed, the Circuit Court of Appeals for the Seventh Circuit held, in *Carolene Products Co. v. Evaporated Milk Association*, 93 F. (2d) 202, that the Filled Milk Act is constitutional. The opinion in that case contains an extensive and illuminating discussion of the question.

The opinion of the District Court which was adopted and applied by the court below rested on *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. The opinion did not discuss or cite the great body of decisions upholding the power of Congress under the commerce clause to prevent the channels of interstate commerce from being used to promote the "spread of any evil or harm to the people of other states from the state of origin." *Brooks* v. *United States*, 267 U. S. 432, 436–437. Those decisions, reviewed and applied in the *Brooks* case, recognized that the harm which Congress may seek to control need not inhere in the articles of commerce themselves. Thus, the stolen automobiles dealt with in the Motor Vehicle Theft Act are not in themselves dangerous articles, at least not so because of their character as stolen vehicles. Therefore any argument designed to prove that the ingredients of filled milk are, separately or in combination, wholesome, is, from the standpoint of the power of Congress, beside the mark. It was never laid down as a limitation on the power of Congress to prohibit the transpor-

tation of articles in interstate commerce that the policy must go no further than to prevent the shipment of articles which are inherently noxious. If any such limitation was ever thought to exist, the misapprehension was clearly dispelled in *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334. In sustaining the Ashurst-Sumners Act, dealing with convict-made goods in interstate commerce, the Court pointed to the wide variety of evils which Congress may seek to control and prevent by the prohibition of interstate shipment. The Court said (299 U. S. at 347):

> The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Oregon Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 99. Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion* v. *Ames*, 188 U. S. 321, 358; *Hoke* v. *United States, supra; Caminetti* v. *United States*, 242 U. S. 470, 486. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress,

> which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks* v. *United States, supra; Gooch* v. *United States,* 297 U. S. 124.

In the *Kentucky Whip and Collar* case the Court reviewed comprehensively the numerous exercises of Congressional power to prohibit interstate transportation. The Court pointed out that this power has been upheld in relation to diseased livestock,[2] lottery tickets,[3] commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier,[4] adulterated and misbranded articles, under the Pure Food and Drugs Act,[5] women, for immoral purposes,[6] intoxicating liquors,[7] diseased

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[2] Act of May 29, 1884, 23 Stat. 31; *Reid* v. *Colorado*, 187 U. S. 137. See *Champion* v. *Ames*, 188 U. S. 321, 358, 359.

[3] Act of March 2, 1895, 28 Stat. 963; *Champion* v. *Ames*, 188 U. S. 321.

[4] Act of June 29, 1906, 34 Stat. 584; *United States* v. *Delaware and Hudson Company*, 213 U. S. 366, 415.

[5] Act of June 30, 1906, 34 Stat. 768; *Hipolite Egg Company* v. *United States*, 220 U. S. 45; *Seven Cases* v. *United States*, 239 U. S. 510.

[6] Act of June 25, 1910, 36 Stat. 825; *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470.

[7] Act of March 1, 1913, 37 Stat. 699; Act of March 3, 1917, 39 Stat. 1069; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *McCormack & Co.* v. *Brown*, 286 U. S. 131.

plants,[8] stolen motor vehicles,[9] and kidnaped persons.[10]

Once the objection is put aside that only noxious articles may be kept from the channels of interstate commerce, the power of Congress to prohibit the interstate shipment of filled milk cannot be assailed. The Filled Milk Act is in fact an instance of one of the most familiar kinds of Congressional regulation of interstate commerce. The Act is designed to protect the public health from injury and to prevent deception through use of the channels of interstate commerce. Congress has found—and its findings, as we shall show, *infra,* pp. 21–28, are amply supported by investigations, by expert opinion, and by widespread public conviction—that filled milk is an adulterated article of food, injurious to the public health, and that its sale constitutes a fraud upon the public. The basic facts underlying this finding may be briefly stated at this point. The butter fat content of whole milk contains virtually all of the Vitamin A for which milk is particularly valuable. The extraction of the butter fat from whole milk and the substitution of coconut oil results in the creation of a product which is almost wholly lacking in Vitamin A and which, nevertheless, because of the substitution of

[8] Act of March 4, 1917, 39 Stat. 1165; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87.

[9] Act of October 29, 1919, 41 Stat. 324; *Brooks* v. *United States*, 267 U. S. 432.

[10] Act of June 22, 1932, 47 Stat. 326; Act of May 18, 1934, 48 Stat. 781; *Gooch* v. *United States*, 297 U. S. 124.

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coconut oil, is indistinguishable in appearance, consistency, and taste from whole milk, except by expert analysis. The importance of Vitamin A as an essential growth-producing and disease-preventing factor, and of the butter fat in milk as a prime source relied upon to supply Vitamin A, particularly in the diet of infants, is widely recognized.[10a] The effect on the public health brought about by the interstate marketing of an imitation product is clearly a matter of which Congress is clothed with the power, if not indeed charged with the responsibility, of taking cognizance and forestalling. The facts underlying the conclusions of Congress are not controverted in the record in the case at bar.

In view of the findings of Congress, the statute is essentially similar to the Pure Food and Drugs Act. Section 7 of that Act provides that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted wholly or in part for the article," or "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imitation of or offered

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[10a] See, *e. g.*, Dr. Henry C. Sherman, *The Meaning of Vitamin A*, in *Science*, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., *The Newer Knowledge of Nutrition* (1929 ed.), p. 134; Dr. A. S. Root, *Food Vitamins* (N. Car. State Board of Health, May 1931), p. 2; Dr. Mary S. Rose, *The Foundations of Nutrition* (1933), p. 237; Dr. Henry C. Sherman, *Chemistry of Food and Nutrition* (1933), p. 367.

for sale under the distinctive name of another article." Section 8 contains a proviso, however, to the effect that an article shall not be considered adulterated or misbranded "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article." Inasmuch as the manufacturers of filled milk do not label their cans as milk, but with trade names such as "Milnut," it was thought that filled milk was not within the purview of the Pure Food and Drugs Act. See Senate Report, *infra*, pp. 50. Indeed, the Filled Milk Act as originally introduced in the House of Representatives took the form of an amendment to the Pure Food and Drugs Act. The author of the bill thus explained the change in form from that of an amendment to that of an independent act (62 Cong. Rec. 7581):

> I will say to the gentleman that I originally introduced the bill, H. R. 6215, which was an amendment to the Pure Food and Drugs Act. That bill I submitted to the Secretary of Agriculture and he objected to it because he did not approve of specifying any particular food product in the Pure Food and Drugs Act. But representatives of the Department appeared before the Committee and expressed themselves in favor of legislation to curb the production and sale of filled milk. Then, after the hearings were completed, I redrafted the

bill in its present form. The subject matter of both bills is the same.

In view of what has been said, the inapplicability of *Hammer* v. *Dagenhart,* upon which the District Court relied, is evident. In that case a majority of the Court regarded the legislation as a regulation of conditions of manufacture, violation of which was penalized by an embargo on interstate transportation. As this Court pointed out in the *Kentucky Whip and Collar* case, there was full recognition in *Hammer* v. *Dagenhart* of the power of Congress to prohibit interstate transportation which served to spread harm among the people of the several States. Consequently, there appears to be no occasion in the present case to reexamine the view of the Court in *Hammer* v. *Dagenhart* in relation to the legislation and the facts there presented. It may simply be observed that a construction of that decision which would make it controlling here would require a departure from established constitutional doctrine applied both before and since that decision.

It is, of course, no valid ground of objection to the statute that it may tend to accomplish a purpose which the States themselves may also seek to bring about. The exercise by Congress of a granted power is none the less valid though it partakes in some measure of the quality of a police regulation. *Seven Cases* v. *United States,* 239 U. S. 510, 514. As was said in *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case,* 188 U. S. 321, 357; *McCray* v. *United States,* 195 U. S. 27; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 58; *Hoke* v. *United States,* 227 U. S. 308, 323; *Seven Cases* v. *United States,* 239 U. S. 510, 515; *United States* v. *Doremus,* 249 U. S. 86, 93–94.

The relation of the Filled Milk Act to state power and state legislation fortifies, rather than weakens, the conclusion that it is a valid exercise of Congressional power. If a State wishes to tolerate the manufacture and sale within its borders of filled milk, there is nothing in the Federal statute which deprives the State of that choice. It is noteworthy, however, that at the time of the passage of the Filled Milk Act in 1923, eleven States had either prohibited entirely the manufacture and sale of filled milk or had restricted the business in such a way as to make commercial exploitation impossible. See Senate Report, *infra,* p. 57. At the present time more than 30 States have enacted legislation which specifically forbids the manufacture and sale

of filled milk. See Appendix B, *infra*. For the very reason that filled milk is not inherently noxious, the States are doubtless without power to prohibit its importation from other States. See *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. Therefore the exercise of Federal power is particularly appropriate in preventing interstate shipment and so in protecting state policy in a majority of the States. In the case at bar, for example, the articles described in the indictment were destined for shipment to Missouri, which since 1923 has outlawed the manufacture and sale of filled milk.

The power of Congress is not, however, dependent upon the prior exercise by the States of their own police power. The Constitution does not require that the Federal Government shall be laggard in recognizing and dealing with the spread of harm; nor need Congress adapt its policy to conform strictly to the policy of the individual States. "The power to regulate interstate commerce resides in the Congress, which must determine its own policy." *Kentucky Whip and Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. at 347. Cf. *United States* v. *Hill*, 248 U. S. 420.

II

THE FILLED MILK ACT DOES NOT VIOLATE THE FIFTH AMENDMENT.

The argument that the Filled Milk Act constitutes a violation of the Fifth Amendment is, we submit, definitely disposed of by the decision of this

court in *Hebe Co.* v. *Shaw*, 248 U. S. 297. That case involved a statute of Ohio which, as construed, forbade the sale of condensed skimmed milk. The statute was applied by the state authorities to the sale of "Hebe," a compound similar in all respects to the product here involved; the article was a combination of skimmed milk and coconut oil. It was urged there that the product was pure and wholesome; that it contained no deleterious substance; that it was properly labeled and sold under a distinctive trade name; and that to prohibit its sale constituted a violation of the Fourteenth Amendment. This Court, affirming a decision of the District Court, held that the statute was applicable in its terms, that it did not constitute a burden on interstate commerce, and that it did not contravene the provisions of the Fourteenth Amendment. This Court said (pp. 302–303):

> the [State] statute could not direct itself to the product [Hebe] as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. *Savage* v. *Jones*, 225 U. S. 501, 524 * * * It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so the statute cannot be avoided by adding a small amount

> of cocoanut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in *making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute.* It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover, when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort. [Italics supplied.]

The products involved in the *Hebe* case and in the case at bar are substantially identical. It is true that the scope of the statutes is somewhat different, but the difference is of no consequence since the application of the statutes to the facts is the same in both cases. Furthermore, in so far as the two statutes differ in scope, the Federal Act falls even more clearly within the bounds of permissible power as described in the *Hebe* case. The statute there involved forbade the sale of all condensed skimmed milk, whether or not a substitute oil was added. That statute was sustained by virtue of a power of the State to save the public from the substitution of skimmed milk for whole milk. This Court held that the addition of coconut oil in the

product involved in that case did not take it out from under the purview of the statute; and that in fact the addition of the oil served to strengthen the resemblance of the product to whole milk and so to make "the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute." The fact that the product was not falsely labeled was held to be immaterial on the question of the power of the State. The Federal Filled Milk Act is confined in its scope to products which, like appellee's, are compounded with substitute oils. It is this element, as the Court observed in the *Hebe* case, which makes the product particularly susceptible of substitution for whole milk through fraud, deception, or ignorance.

Apart from the decision of this Court in *Hebe Co.* v. *Shaw,* the fact that 31 States have specifically prohibited the manufacture and sale of filled milk is evidence of the strongest sort that the prohibition in the Federal Act rests not on arbitrary fiat but on widespread conviction that the prohibition is necessary in the public interest.[11] As was said in

[11] In three states statutes prohibiting the sale of filled milk have been declared unconstitutional. *People* v. *Carolene Products Co.*, 345 Ill. 166, followed in *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62; *Carolene Products Co.* v. *Thomson*, 276 Mich. 172; *Carolene Products Co.* v. *Banning*, 131 Neb. 429. Four similar State statutes have been sustained. *Reiter* v. *State*, 109 Md. 235; *State* v. *Emery*, 178 Wis. 147; *Hebe Co.* v. *Calvert*, 246 Fed. 711, affirmed

Purity Extract Co. v. *Lynch*, 226 U. S. 192, 204–205: "That the opinion is extensively held * * * sufficiently appears from the legislation of other states and the decision of the courts in its construction. * * * We cannot say that there is no basis for this widespread conviction."

The Congress did not, however, rely merely upon the fact that at the time of the enactment of the Federal Act eleven States had effectively prohibited the manufacture and sale of filled milk. Congress undertook an extensive and independent investigation of its own. Hearings were held before the Committee on Agriculture of the House of Representatives from June 13, 1921, to July 20, 1921 (Hearings on H. R. 6215, 67th Cong., 1st Sess.). The Senate Committee on Agriculture and Forestry held hearings from June 30, 1922, to August 7, 1922 (Hearings on H. R. 8086, 67th Cong., 2d Sess.). At the House Committee hearing twelve witnesses appeared in support of the bill and twelve against. At the Senate Committee hearing 27 witnesses appeared in support of the bill and 20 against.

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248 U. S. 297; *Carolene Products Co.* v. *Carter*, Supreme Court of Pennsylvania, decision not yet reported. As will be noted from Appendix B, *infra*, pp. 60–68, many of the state statutes whose validiy has not been expressly passed upon have been in effect for 15 years or more. No persuasive reason has been advanced why the decision in *Hebe Co.* v. *Shaw*, *supra*, should not be deemed controlling on the Federal constitutional question.

Among the witnesses who testified in support of the bill before one or both of the committees, either orally or through the presentation of written statements, were scientists of outstanding reputation and achievement. These included Dr. E. V. McCollum, head of the Department of Chemistry, School of Hygiene and Public Health, The Johns Hopkins University (House Hearings, pp. 19–37; Senate Hearings, pp. 20–25; 166–192)[12]; Dr. Charles S. Summers, head of the Children's Clinic, University of Maryland (Senate Hearings, pp. 47–49)[13]; Dr. John C. Gittings, Professor of Pediat-

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[12] Dr. McCollum stated: "I guarantee that any infant that is fed for a few weeks on one of these milk substitutes will develop rickets as severe as you see it right here [exhibiting photograph]" (House Hearings, p. 33). Dr. McCollum described experiments which he had conducted on animals fed with filled milk and with evaporated whole milk:

"I have here two animals which were fed on this same diet of rolled oats, properly supplemented with inorganic elements, and in this case we put in 22½ per cent of Hebe, a filled milk with coconut oil in place of butter fat. You will notice that this rat is very emaciated and thin, that his eyes are swollen shut, and I will tell you we photographed him only the day before he died, because his death was imminent.

"This one had been on the same diet, except that we substituted the 22½ per cent of Hebe by a 22½ per cent of Carnation milk made by the same company that manufactures Hebe. The animals were fed the same amount, but Carnation milk had the butter fat in it whereas Hebe did not have it" (Senate Hearings, p. 24).

[13] Dr. Summers stated that in Maryland, where he practiced, the sale of filled milk was prohibited, and said: "if you substantiate as a fact that the babies are being fed a

rics, Graduate School of Medicine, University of Pennsylvania (Senate Hearings, pp. 25–27; 192–194)[14]; Professor E. B. Hart, Department of Agricultural Chemistry, University of Wisconsin (House Hearings, p. 161; Senate Hearings, p. 245).[15] Witnesses of scientific qualifications likewise testified in opposition to the bill.

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vegetable food, which is devoid of vitamins, with skim milk; if you substantiate this, you are absolutely doing the babies and children in the United States an untold harm to allow the sale of filled milk to continue" (Senate Hearings, p. 49).

[14] Dr. Gittings stated: "I have been practicing pediatrics for 25 years, and if there is any one thing in the realm of feeding or of nutrition that has impressed itself upon my mind in that time, it is that the child who, for any reason, is deprived of butter fat, labors under a tremendous handicap, and sooner or later, to a greater or less degree, almost invariably will be undernourished and often subnormal in growth. That is a fact which I think is incontrovertible.

* * * * *

"* * * If you voluntarily deprive the child of cow's milk fat and substitute another form of fat, you can expect undernutrition, and undernutrition is almost surely followed by the disease known as rickets" (Senate Hearings, p. 26).

Dr. Gittings further stated: "My own experience of 25 years of infant feeding has been that there is no more sure way of producing rickets than by feeding skimmed milk deprived of fat and bolstered up with carbohydrates" (*Id.*, pp. 192–193).

[15] Professor Hart, in an article published in Bulletin 342, Wisconsin Experiment Station, stated: "Whole milk in the nutrition of the young stands in a class by itself as a great protective food, and any attempt to substitute something inferior, such as filled milk, is to traffic in human lives for monetary gain. * * * We urge Federal legislation that will prohibit the manufacture and sale of filled milks. Such

The conclusion necessarily to be drawn from the hearings is that, viewed in the light most favorable to the opposition, the question whether filled milk should be prohibited in the channels of interstate commerce, in the interest of health and the prevention of deception, was a debatable one. This conclusion was frankly expressed by one of the opposition witnesses, Dr. Casimir Funk, of Columbia University, who said (Senate Hearing, p. 123):

> What I have said here indicates plainly there are two opinions on the skimmed-milk legislation—one opinion headed by Doctor McCollum and others, maintaining that such products should be barred from the market; other opinions maintained by Dr. Mendel, myself, and others imagine that this measure would not be justified on the face of the present scientific facts.

While it is not feasible to recount in detail the evidence before the Congressional committees, a convenient summary of that evidence is contained in the opinion of the Circuit Court of Appeals for the Seventh Circuit in *Carolene Products Co.* v. *Evaporated Milk Association,* 93 F. (2d) 202.

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legislation should be passed if for no better reason than that an uninformed public is just as likely to buy the substitute as it is to buy the genuine article, namely, the evaporated whole milk" (Senate Hearings, p. 245). Professor Hart pointed out that experiments demonstrated that at least 90 per cent of the fat-soluble vitamin of whole milk is removed in the modern commercial skimming process (~~Home~~ House Hearings, p. 161).

With respect to the harmful effects of the use of filled milk as a substitute for whole milk, the court thus summarized the evidence (93 F. (2d) 205):

> The scientists before the committees pointed out that milk is a food for which there is no effective substitute and upon which we have depended for generations; that the valued Vitamin A of milk occurs in no vegetable oil; that an infant fed for a few weeks on a milk substitute, such as here involved, will develop rickets, scurvy, serious eye diseases; beriberi; that even tuberculosis may be traced to the lack of the vitamins of milk in the diet; and that the chief source of such in milk is the butter fat which is removed from filled milk. Experts testified that, when rats were fed over a given period of time on identical rations except that in one pure milk was used and in the other filled milk, those fed on the first diet grew in a natural way, whereas those fed on the second grew to but half the size, developed bodily deformities contracted a fatal eye disease, and died within sixty days after the experiment began. The witnesses asserted that a nursing mother who does not receive sufficient Vitamin A in her diet supplied only by milk can not transmit healthful milk to her offspring.
>
> The evidence included reports from various authentic sources to the effect that butter fat possesses a biological function which can not be supplied by any vegetable oil in combination with skimmed milk; that

> growth of the human body and the quality of children's teeth and their health depend largely upon milk in the diet; and that "there is no evidence of any satisfactory substitute but every evidence against the substitution of cheap vegetable fat."

And with respect to the danger of deception, through fraud or ignorance, in the marketing of filled milk as a substitute for whole milk, the court said (93 F. (2d) 205):

> That the Congress had reliable information before it supporting the wisdom of the proposed legislation appears from the reports of its committees. Those bodies found and reported certain facts: The mixture of skimmed milk and oil is an exact imitation of pure condensed or evaporated milk; it has the same consistency, color and taste; the difference in the two products can be detected only by an expert or by chemical analysis; the compound can be made more cheaply than the regular article, and in view of the fact that the imitation is perfect, many people buy it in the belief that they are getting full condensed or evaporated milk; manufacturers do not label it as milk but it is put up in the same sized cans as regular condensed milk and is advertised by the retail dealers as milk and evaporated milk. Storekeepers sell it with the statements that "it takes the place of milk," "is just as good as condensed milk and much cheaper"; that there is "nothing better on the market" and

> "takes the place of condensed milk." Instances were reported in which coconut fat had been mixed with milk and sold as cream and others in which the compound had been used in making ice cream. The article is sold largely in sections inhabited by people unable to read English and of limited means, and scarcely at all in the more enlightened districts. As a consequence, the label is of little or no protection to the purchasing public, in advising them that the product they buy is a mixture of milk and vegetable oils.

The reports of the Congressional committees, printed in full, *infra*, pp. 31–46, contain clear and detailed findings in support of the conclusion, as expressed in the statute, that filled milk is injurious to the public health and its sale constitutes a fraud upon the public. The appellee has made no effort in the present case to attack the findings of Congress by specific evidence. Cf. *Packer Corp.* v. *Utah*, 285 U. S. 105, 111. Such an attempt would involve the burden of demonstrating that by no possibility could the findings of Congress be supported. The evidence upon which Congress itself acted is manifestly more than sufficient to withstand such an attack if any were attempted. "When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsi-

bility of decision." *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, No. 161, present term, decided February 14, 1938.

Certainly the power to prohibit the sale of filled milk exists in no less degree than the power to prohibit the sale of oleomargarine artificially colored to resemble butter. In *McCray* v. *United States*, 195 U. S. 27, 64, this Court said that "the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights." Indeed, it has been held that the use of harmless coloring in oleomargarine may be prohibited even though its similar use in the manufacture of butter is permitted. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246.

The argument of appellee is not advanced by suggesting hypothetical attempts to prohibit wholesome articles of food because they are less nutritious than other articles of food with which they may compete. The present case involves a product which is made to resemble milk by the substitution of an inferior ingredient for a vital component of ordinary milk. The Constitution, we submit, does not forbid the States and the Federal Government from preventing such substitution in the case of a food such as milk which has a unique place in the human diet. The argument founded upon a hypothetical extension of the case to other products in other circumstances was nowhere more strongly advanced than in the dissenting opinion

of Mr. Justice Field in *Powell* v. *Pennsylvania*, 127 U. S. 678, 698:

> What greater invasion of the rights of the citizen can be conceived, than to prohibit him from producing an article of food, conceded to be healthy and nutritious, out of designated substances, in themselves free from any deleterious ingredient? * * * Indeed, there is no fabric or product, the texture or ingredients of which the legislature may not prescribe by inhibiting the manufacture and sale of all similar articles not composed of the same materials.

This Court rejected that argument when it was there advanced, and we see no reason why it should not similarly be rejected now.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to overrule the demurrer.

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FEBRUARY 1938.

APPENDIX A

CONGRESSIONAL COMMITTEE REPORTS

67TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 355

FILLED-MILK LEGISLATION

AUGUST 19, 1921.—Referred to the House Calendar and ordered to be printed

Mr. VOIGT, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 8086]

The Committee on Agriculture, to whom was referred the bill (H. R. 8086) to prohibit the shipment of filled milk in interstate and foreign commerce, having considered the same, report it back to the House without amendment, with the recommendation that the bill do pass.

PURPOSE OF THE BILL

During the last five or six years the manufacture of so-called filled milk has assumed considerable proportions in this country, and the bill proposes to prohibit the manufacture of this compound in the District of Columbia, the Territories, and insular possessions, and to prohibit its shipment in

interstate and foreign commerce. Filled milk is defined to mean "any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated."

The bill provides a penalty of a fine not exceeding $1,000, or imprisonment for one year, or both, and has the usual provision that the act, omission, or failure of any person acting for or employed by another, within the scope of his employment or office, shall be the act, etc., of the principal, as well as of the agent or employe.

THE COMPOUND

Filled milk is an imitation of condensed or evaporated milk made by mixing condensed skimmed milk and coconut oil. The skimmed milk is reduced by evaporation to about half its bulk, and after this operation there is added from 6 to 8 per cent of coconut fat. The resulting mixture is an exact imitation of pure evaporated or condensed milk; it has the same consistency, the same color, the same taste, and the difference in the two products can only be detected by an expert or by chemical analysis.

The compound can be made more cheaply than the regular article, and, in view of the fact that the imitation is perfect, many people buy it in the belief that they are getting full condensed or evap-

orated milk. According to the testimony of the leading manufacturer, skimmed milk has recently sold for 35 cents per hundred and refined coconut fat at 12 cents per pound. The cost of a quantity of skimmed milk and coconut fat sufficient to fill 48 1-pound cans of the compound is a little over 80 cents, or less than 2 cents per 1-pound can. The retail price of the 1-pound can is from 10 cents up. The Bureau of Markets gives the following figures of the production of the compound in recent years:

	1920	1919	1918	1917
Evaporated, part or full skimmed, modified with foreign fat (case goods)	84,044,000	62,202,225	50,619,163	30,138,262
Evaporated, part or full skimmed, modified with foreign fat (bulk goods)	2,517,000	2,748,120	3,861,097	4,543,648

In 1920 nearly 8,000,000 pounds of coconut fat were used in the manufacture of filled milk, taking the place of that many pounds of butter fat, injuring the market of the American farmer, and bringing his product in competition with a decidedly inferior product produced by oriental and other cheap labor and handled in many instances under shockingly insanitary conditions.

FRAUD ON THE PUBLIC

Filled milk is sold under various trade names, such as "Hebe," "Carolene," "Enzo," "Silver Key," "Nutro," and "Nyko." The manufacturers can not sell it as milk, but it is put up in the same size cans as regular condensed milk, and the evidence before the committee shows that it is advertised by the retail dealers as milk and evaporated milk. Storekeepers sell it with the statements

that "it takes the place of milk," "just as good as condensed and much cheaper," "nothing better on the market," "takes the place of condensed milk." Instances have been found in which the coconut fat was mixed with milk and sold for cream; the compound has been used for making ice cream, and recently a company has been formed at Pittsburgh to manufacture an artificial cream from skimmed or fresh milk and coconut fat. The company states in its prospectus, "we can wholesale our Kream for 100 per cent less than cow's cream and still make a profit of over 100 per cent." In many cases retailers sell the compound for the same price as the straight evaporated milk, although the price per 1-pound can to them is about 3 cents less. A number of surveys in various parts of the country show that the compound is sold largely in sections inhabited by people unable to read English and sections inhabited by people of limited means, and not sold at all in better residential districts. The fact that it is largely sold in the sections mentioned shows that the statements on the label that the article is a compound is not a sufficient protection to the public.

It appears that even the United States Government was defrauded into buying this compound. At Camp Willis, Ohio, in 1913, two carloads of it were furnished at this camp for the use of the troops, and the mess sergeant stated that he had been informed that it was better than milk.

There is ample evidence that the compound is sold at retail as milk, but the interstate shipment can not be prohibited under existing law because the manufacturers label it under a trade name, and

not as milk. There is no doubt that the sale of the compound violates the spirit, if not the letter, of the pure food and drugs act. The act provides (sec. 7) that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or, "if any substance has been substituted wholly or in part for the article," or, "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imitation of or offered for sale under the distinctive name of another article," but the manufacturers escape under a proviso to section 8 that an article shall not be considered adulterated or misbranded, "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article." * * *

The regulations prescribed by the Department of Agriculture in pursuance to the pure food and drugs act contain the following:

> Condensed milk, evaporated milk, concentrated milk, is the product resulting from the evaporation of a considerable portion of the water from the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows * * * and contains, all tolerances being allowed for, not less than 25.5 per cent of total solids, and not less than 7.8 per cent of milk fat.

No reason is perceived by the committee why an exact imitation of or substitute for this article should be permitted to be sold to the public which does not meet these requirements.

Dr. McCollum, of Johns Hopkins University, a high authority on the subject of nutrition, testified before the committee that the vitamines, which are absolutely necessary to promote growth in the human body, are found most abundantly in butter fat, and that milk is the chief article of food relied upon for the vitamines. Dr. McCullum demonstrated his contentions before the committee by showing photographs of rats which had been fed experimentally on diets with and without butter fat, and the results obtained were astounding. He said:

> There is no question but what milk is the only food for which there is no effective substitute. It is not a question of whether there is some food value in skimmed milk, as to whether we can not get along in some peculiar situation, that one might not get along if a suitable amount of eggs were included in the diet every day. It is not a question whether technically you can bring before a legislative committee of this sort a situation which might work in a satisfactory manner without this food. But this is the point, that we are educated to use milk. We are a people who for hundreds of generations have depended upon dairy products as a prominent article of our diet. We know how to use it, and we like it. We have an agricultural industry which can not remain a permanent one—there can be no permanent system of agriculture without an animal industry to go with it. * * * We have no deposits of phosphorus and no adequate deposits of calcium that will meet the agricultural needs of this country for ferti-

> lizer. * * * There is no similar property [vitamines] in any vegetable oil, including coconut oil and cottonseed oil, comparable with what you find in butter fat. * * * I guarantee that any infant that is fed for a few weeks on one of these milk substitutes will develop rickets. * * * My suggestion is that we do everything that is in our power to maintain at its full tide an industry so important as the dairy industry, and to bring the American cow into competition with a coconut grove is an injustice.

Dr. E. B. Hart, of the University of Wisconsin, says:

> I have already stated in hearings before legislative committees in our own State that at least 90 per cent of the fat soluble vitamin of whole milk is removed in the modern commercial skimming process. This statement is based upon recent experiments in our laboratory, where refinement of control has been perfected, as contrasted with the older experiments made by Dr. McCollum, which led him to state that there was still about 50 per cent of the fat soluble vitamine in skim milk. Consequently filled milk is not completely devoid of the fat soluble vitamine, but it does not begin to compare with whole milk in respect to its content of this nutritional factor.

In a few years the output of filled milk has grown 5,000 per cent, and the manufacturers frankly stated before the committee that the business is in its infancy. The committee is of the opinion that the traffic in the article should be stopped now, before irreparable injury is done the health of the Nation and before serious damage is done

to the dairying industry. The vast dairying industry of this country is absolutely vital to a proper system of agriculture and to maintaining the fertility of the soil.

The farm and dairying organizations are a unit in opposing the manufacture of this compound. If the business grows, as it will without legislative interference, it will mean a decided decrease in the dairy herds of the country. Instead of vast quantities of whole milk being condensed, the butter fat will be extracted and turned into a comparative oversupply of butter. The oversupply will depress the price, and as the price of milk is regulated by the price of butter fat, the keeping of dairy herds will become less profitable. It is possible that in isolated instances farmers receive more money for their milk where the skimmed milk is manufactured into the substitute, but there can be no question that the introduction of the cheap coconut oil in competition with butter fat is an economic injury to the dairying industry as a whole.

VIEWS OF AGRICULTURAL DEPARTMENT

Dr. C. W. Larson, chief of the dairy division of the department, appeared before the committee and stated that he considered the manufacture of filled milk to be a slight injury to the dairying industry now, but that it would be a decided injury if the manufacture were to increase; that the use of the compound decreases the use of the product of the cow; that by the manufacture of the compound an additional market is not found for the farmers' product; that he was informed by a manager of a company having 156 stores in Washington that the

compound is sold at the same price and for the same purpose as was regular evaporated milk.

> I believe that in a nation that has one outstanding industry like agriculture in this country it is to the interest of all the people of the Nation to develop and further that industry. I further believe that the dairy industry is vitally connected with our whole agriculture. What I mean by that is that dairying is important from the standpoint of the production of wheat and corn and all our other crops. * * * I think it is desirable and important that that industry be maintained and not injured by some imitation.

Dr. C. F. Langworthy, chief of the office of home economics of the department, stated that he would not object to the compound if its use could be limited to the same use that skimmed milk is put, but that he would not approve of it as a substitute for regular milk, either for infants or adults.

OTHER MANUFACTURERS

It is probable that some of the manufacturers of the compound were driven into the business in order to meet competition. Mr. Walter Engels, representing the Borden Co., the largest manufacturer of evaporated milk in the country, stated that—

> His company has always stood for the highest ideals in the production and manufacture and care of milk; and among those ideals is the thought that the public should receive the butter fat in all milk products as the milk comes from the cow. * * * If Congress or the several States do not do

something to stop this competition, our company may be compelled as a matter of necessity to meet this competition to go into the manufacture of it, much as they dislike to do so. * * * Some critics have thoughtlessly argued that the manufacturers of the legitimate article should meet this competition by reducing the price to meet it. * * * There is only one way you can meet it, and that is to go in and make it yourself, and I know that some of these other companies do not want to make this stuff. They were dragged into it to meet competition with their legitimate articles. If Congress would stop the sale of it, I think they would be glad to stop the manufacture of it. * * * The Hebe Co. has applied for registration of its trade-marks in * * * many other countries. * * * That means that they intend to extend this compound business to foreign markets, and when they find out what this stuff is the whole condensed-milk industry is going to get the black eye that the filled-cheese industry got.

For the calendar year 1919 we exported 850,865,414 pounds of condensed milk, and for 1920, 414,250,021 pounds.

CONSTITUTIONALITY

There is nothing new in the proposal that milk products not containing a certain amount of butter fat shall not be transported or sold in interstate or intrastate commerce. Under the pure food and drugs act as it now stands, milk and condensed milk can not be shipped in interstate commerce unless they contain a given percentage of butter fat, and certainly it is proper to insist upon the same

standard in an imitation or substitute article. Congress, by virtue of the pure food and drugs act, has barred from interstate commerce many drugs and articles of food which do not comply with certain standards. It has barred therefrom obscene literature and lottery tickets.

> The power given to Congress by the Constitution over interstate commerce is direct, without limitation, and far-reaching. Congress may adopt not only the necessary but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulations.

In the lottery cases (188 U. S., 321) the principle was established—

> That it is equally within the power of Congress in regulating interstate commerce to protect the public morals as it is to protect the public health or the economic welfare of the people. (*Hoke* v. *U. S.*, 227 U. S. 308.)
>
> Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles. Congress may itself determine means appropriate to this purpose; and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect. (*McDermott* v. *Wis.*, 228 U. S., 115.)
>
> Congress is not to be denied the exercise of its constitutional authority over interstate commerce and of its power to adopt means

necessary and convenient to such exercise merely because those means have the quality of police regulations. (*Eckman Alterative Case*, 239 U. S., 510.)

An Ohio statute forbids the manufacture and sale of condensed milk unless made from unadulterated milk from which the cream has not been removed and in which the milk solids are equivalent to 12 per cent of those in crude milk and 25 per cent of them fat, and skimmed milk is permitted to be sold only under certain restrictions. The secretary of agriculture of Ohio in 1918 threatened prosecutions for the sale of Hebe filled milk, and the Hebe Co. brought a suit in equity in the United States District Court in Ohio to restrain the prosecutions. The case went to the United States Supreme Court. (248 U. S., 297.) The court held that the Hebe product fell within the condemnation of the statute; that the statute was a valid exercise of the police power of the State, and that no constitutional right of the Hebe Co. was infringed. The court says:

> But the statute could not direct itself to the product as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials, the object plainly being to secure the presence of the nutritious elements mentioned in the act and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. * * * It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so, the statute can not be avoided by adding a small amount of coconut oil. We may assume that the

product is improved by the addition, but the body of it is still condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiff's cans tells the truth—but the consumer in many cases never sees it.

LEGISLATION IN VARIOUS STATES

While the proposed bill will not prohibit the manufacture and sale of the compound within the limits of a State, the committee is of opinion that a law prohibiting interstate shipment will suppress it, because a sufficient market can not be found without such shipment, and also because a sufficient milk supply can not be found in many States which would warrant engaging in the enterprise.

Furthermore, quite a number of States have already passed laws outlawing the compound. Wisconsin recently passed a law making it unlawful to manufacture it. Utah, Maryland, Florida, California, Colorado, Connecticut, and Oregon have laws either suppressing the compound or providing such stringent regulations as to make its sale impossible. In New York both houses of the legislature passed similar bills, but it failed to go to the governor. In New Jersey a similar bill was vetoed by the governor. In Pennsylvania a bill was passed by the house but died in the senate committee. Ohio has had a law for many years under which the compound was suppressed, and this year a resolution was adopted by the board of health of the City of

New York to the same effect. The department of health—

> Takes this position for the reason that coconut oil does not possess the food value that butter fat possesses and the substitution of same for any milk product would undoubtedly be reflected in the health of the children of this city. Coconut oil is no substitute for milk. Coconut oil does not possess the same growing qualities found in the butter fat of milk, and any legislation which would permit the addition of coconut oil to any milk product would be opposed to the best interests of the people of the city. * * * The board of health of this city has adopted a standard for ice cream in which the use of coconut oil or vegetable fats is prohibited.

MINORITY VIEWS

As a member of the Committee on Agriculture, I earnestly dissent from the views of the majority of said committee as expressed in the report filed herein on H. R. 8086.

The testimony before the committee in extensive hearings proved conclusively that—

1. The "filled milk" complained of, composed of skim milk and vegetable oil, is not unwholesome, deleterious, or injurious to health, but a wholesome and nutritious food. To this statement the proponents of the bill agree.

2. "Filled milk" is properly, clearly, and plainly labeled in compliance with ample existing law, indicating distinctly the uses for which the food is recommended.

3. "Filled milk" is about 3 cents a can cheaper than whole milk, offering an opportunity for thousands of American people limited in finance to purchase this wholesome food at prices within their reach, when the world demand is to reduce the cost of necessities.

4. The manufacture of "filled milk" does not injure the dairy business, but, on the contrary, last year created a market for 200,000,000 pounds of skim milk which formerly had no market value whatever.

It would be monstrous for the Congress, as proposed by this bill, to legislate out of existence any legitimate business, heedless of the millions honestly invested.

This bill is of doubtful constitutionality. If the retailers practice any deception the remedy is regulation of the distributors and not destruction of private business.

Believing that the Government should not destroy any legitimate business, that there is no demand for this legislation except from those selfishly interested in removing competition, and that the sentiment of the public is in harmony with these views, I recommend that this bill be not passed.

J. B. ASWELL.

Calendar No. 963

67TH CONGRESS, 4th Session } SENATE { REPORT No. 967

FILLED MILK LEGISLATION

JANUARY 3 (calendar day, JANUARY 4) 1923.—Ordered to be printed

Mr. LADD (for Mr. NORRIS), from the Committee on Agriculture and Forestry, submitted the following

REPORT

[To accompany H. R. 8086]

The Committee on Agriculture and Forestry, to whom was referred the bill (H. R. 8086) to prohibit the shipment of filled milk in interstate or foreign commerce, having considered the same, report favorably thereon with certain amendments, and, as amended, recommend that the bill do pass.

Your committee recommend a slight change in the wording of the bill as passed by the House of Representatives, which does not change its meaning or purpose, and the insertion of appropriate language to permit the shipment in interstate and foreign commerce of proprietary food compounds designed and prepared solely for feeding infants and young children. The House bill as amended follows, with matter to be omitted struck through, and matter to be inserted appearing in italics:

AN ACT to prohibit the shipment of filled milk in interstate or foreign commerce

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever used in this act—

(a) The term "person" includes an individual, partnership, corporation, or association:

(b) The term "interstate or foreign commerce" means commerce (1) between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; (2) between points within the same State, Territory, or possession, or within the District of Columbia, but through any place outside thereof; or (3) within any Territory or possession, or within the District of Columbia; and

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated~~, and as such is an adulterated and deleterious article of food, and when marketed as such constitutes a fraud upon the public.~~ *This definition shall not include any distinctive proprietary food compound not readily mistaken intesta for milk or cream or for evaporated, condensed, or powdered milk or cream, provided that such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than 16½ ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists,*

orphan asylums, child welfare associations, hospitals, and similar institutions and generally disposed of by them.

SEC. 2. *It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public.* It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk.

SEC. 3. Any person violating any provision of this act shall, upon conviction thereof, be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both; except that no penalty shall be enforced for any such violation occurring within thirty days after this act becomes law. When construing and enforcing the provisions of this act, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

WHAT IS FILLED MILK?

It is a compound of skimmed milk and coconut oil. The manufacturers buy the whole milk, separate the butter fat, and sell the latter for cream or use it in the manufacture of butter. The skimmed milk is then mixed with from 3 to 4 per cent coconut oil, and this mixture is then reduced by evaporation to about half its bulk. The coco-

nut oil is reduced in bulk very little, if any, by the process of evaporation, so that when the compound is ready for canning it consists of skimmed milk reduced to about half its bulk, and, as the coconut oil was not reduced in the process of evaporation, from 6 to 8 percent of the oil. The compound is an exact imitation of evaporated milk, in color, consistency, smell, and taste, and the difference between it and evaporated milk can only be ascertained by chemical analysis. The compound can be manufactured for less than half of the cost of evaporated milk. The Bureau of Agricultural Economics, United States Department of Agriculture, furnishes the following figures showing the production of filled milk:

[Expressed in pounds]

Year	Canned	Bulk	Total
1916	12,000	14,134,712	14,146,712
1917	18,504	17,489,064	17,505,568
1918	41,033,855	7,591,182	48,625,037
1919	62,262,221	2,748,120	65,010,341
1920	64,044,000	2,517,000	66,561,000
1921	59,020,000	5,873,000	64,893,000

METHOD OF LABELING AND MARKETING

The pure food and drugs act (sec. 7) provides that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted wholly or in part for the article," or "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imita-

tion of or offered for sale under the distinctive name of another article." However, section 8 of this act has a proviso under which the manufacturers of filled milk claim the right to manufacture it, to the effect that an article shall not be considered adulterated or misbranded "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article."

The manufacturers of filled milk do not label their cans as "milk," as that would be a violation of the act, but use such trade names as "Hebe," "Carolene," "Majal," "Nutro," "Enzo," "Nyko," "Silver Key." The compound is put up in the same size and style of cans as the genuine evaporated or condensed milk and is carried by the retail dealers on the shelves side by side with the genuine product. Your committee does not doubt that the sale of filled milk as at present carried on is a violation, if not of the letter, of the spirit of the pure food and drugs act. This act can not regulate the conduct of the retail dealer. He can buy this compound for about 3 cents per 1-pound can less than he is obliged to pay for the genuine article. Many instances were brought to the attention of your committee where retail dealers advertised the compound as "Hebe milk," "Silver Key milk," etc., and investigations conducted in many of our large cities reveal that the dealers were selling the compound as being as good and better than regular evaporated milk. It was shown that the compound was largely sold in sections of cities inhabited by people unable to read the label and people of limited means.

One of the great dangers incident to the marketing of filled milk lies in the bulk sales. The statistics for the past year show that the sale in bulk is now on the increase. When used in hotels and restaurants and for making ice cream, the consumer has no means of knowing what he is getting, and a label could not protect against fraud in such a case. If bulk shipments should be allowed, commercial chemists may discover a method by which the compound in bulk may be refilled into cans for retail sales within the limits of a State, and thus the whole object of the legislation might be frustrated.

EFFECT ON THE PUBLIC HEALTH

In recent years scientists have discovered food elements known as "vitamines" which are highly essential to the growth and well-being of the human body. It has been found that such diseases as rickets, scurvy, serious eye diseases, beriberi, and even tuberculosis, may be traced to the lack of vitamines in the diet; in fact, the lack of vitamines reduces the whole vitality of the body and invites disease. Our chief source of the vitamines is milk, and the vitamines are found almost wholly in the butterfat of the milk. Four distinct kinds of vitamines have been discovered. The extraction of the butterfat from the milk seems to leave in the skimmed milk only a trace of so-called vitamine A. The experiments of such experts as Doctor McCollum, of Johns Hopkins University, and Doctor Hart, of the University of Wisconsin, show in the striking way the lack of vitamines in the diet. It has been found, for instance, that rats fed on a ration consisting of 60 percent oats, 1 percent salt, 1½ percent lime, 15 percent dextrin, 22.5 percent

evaporated milk, grew in a natural and healthy way, whereas rats fed on the same diet, substituting filled milk for the evaporated milk, grew in the same time to but half the size, had bodily deformities, contracted a fatal eye disease and died within about 50 days after the experiment began.

Vitamines are not produced by the cow, but are found in her food and concentrated in the milk. The human body does not produce them, but must receive them in the food. It follows, therefore, that a nursing mother who does not receive sufficient vitamines in her diet can not transmit healthful milk to her offspring. It is a curious fact that all vegetable oils and fats are wholly lacking in vitamines. It is a fact that there is in the United States considerable undernourishment of the population, especially in our larger cities. This would appear to be due in part at least to the fact that in our preparation of food for the market we have extracted at least in part valuable mineral elements and vitamines. It is therefore all the more necessary that we supply the vitamines in the milk. Milk is the one chief food of the Nation, and no adulteration of it or substitution for it should be permitted.

While there are now over a dozen brands of filled milk on the market, only one manufacturer has attempted to restrict the sale of the compound for certain uses. Your committee is of the opinion that it is impossible to prevent fraudulent use and sale of this compound, on account of the incentive of additional profit held out to the retail dealers, and no doubt in many cases due to the fact that the retailers themselves do not know wherein the compound differs from the genuine evaporated milk.

The Hebe Co. does label its cans to the effect that the contents should not be used for infant feeding, but your committee is informed that mothers have written the company informing it that they had been feeding infants on "Hebe." The manufacturers of "Hebe" recommend their product for use in cocoa, soups, gravies, bread, etc., but it is evident that when children are so fed in place of with milk the consumer fails to receive the proper elements of nutrition.

Your committee has provided for an exception in case of compounds designed wholly for the feeding of infants. The exception is carefully worded so that under it filled milk can not be shipped in interstate commerce. There are cases in which whole cow's milk is not acceptable to an infant, and where it has been found that compounds of skimmed milk, cocoanut oil, cod liver oil (rich in vitamines) and other ingredients may be more acceptable. These infant foods are in nearly every case used on the advice of a physician.

COUNTER ARGUMENTS

The manufacturers of filled milk were given every opportunity to establish their claims before the committee. Their chief arguments are: (1) That the proposed legislation is the result of a trade war between manufacturers of milk products; (2) that the compound is wholesome; (3) that the manufacture of it affords the farmer an additional market for skimmed milk; (4) that their use is a convenience and an economy to the users; (5) that the compounds are accurately labeled and sold by the manufacturers for what they are; (6) that the bill is unconstitutional.

Commenting on these claims, we wish to say:

(1) The author of the bill informed the committee that he had no benefit or detriment to any manufacturer in mind when drawing the bill, and did not communicate with, directly or indirectly, any manufacturer of filled or evaporated milk; that his only motive was to protect the public health and the dairy industry.

(2) There is no claim that the compound in and of itself is unwholesome. If used by the consumer in limited quantities, with an exact knowledge of its deficiencies, and the ability to supply these deficiencies, there would be little harm in its use. But we fear that such a condition does not obtain in practice, and are convinced that the use of the compound, as it is and will be sold, unless protected, is injurious to the public health.

(3) The claim that an additional market is found by the manufacture of this compound for the farmer's skimmed milk is not well founded. Even if this claim could be substantiated, it would in the judgment of the committee, be no justification for its manufacture. However, the evidence shows that the skimmed milk used in filled milk should be used within an hour of the separation process. The skimmed milk coming from the average creamery and cheese factory, therefore, can not be used at a filled-milk plant on account of the delay due to transportation. Moreover, opponents of the measure were unable to demonstrate to the committee any uses for the compounds which were different from or additional to the uses of whole milk. It is therefore logical to conclude that, since there is approximately an equal amount of

skimmed milk in a can of evaporated milk to that in a can of the compound, the skimmed milk consumed would be the same and the skim affords a cheap medium through which a market is found for a more expensive fat. Opponents inferred that fat was the medium used to market the skimmed milk. This, of course, was not sustained, since the value of 100 pounds of skimmed milk was shown to be from 35 to 50 cents, while the value of 4 pounds of coconut oil would be approximately 48 cents, and the value of 4 pounds of butter fat would be approximately $1.72, at the time that the hearings were held. It must be apparent that the manufacturer of the compound is seeking greater profits by the substitution of cheaper, less digestible, and inferior fats for the growth-producing butter fat. It was also demonstrated to your committee by competent witnesses that there is not as much waste of skimmed milk as people generally imagine. In the creamery and cheese-factory districts skimmed milk is generally made into cottage cheese or is sent back to the farm, where it serves a very useful purpose in supplementing live-stock rations, and it is in these districts where most of the skimmed milk is produced.

(4) As to the convenience and economy in the use: There is no purpose for which filled milk is used where evaporated or condensed milk will not do as well or better. The genuine article can be obtained in any store which carries the compound. There is no shortage of evaporated milk. As to the economy, it appears that in hundreds of stores in the country the filled milk was sold for the same price as the evaporated, sometimes even at a higher

price and sometimes at a slightly lower price. Even if it is conceded that the filled milk is sold cheaper, there is no economy, because the buyer at the reduced price is not getting his money's worth.

(5) The question of labeling has already been touched upon. It is impossible for the public to know what the valuable ingredients are which have been extracted from the contents, even with a thorough reading of the label.

(6) The question of constitutionality was not seriously pressed before the committee. We are thoroughly satisfied that Congress has the power to exclude from interstate and foreign commerce any article which is in the exercise of fair judgment injurious to the public health. Under the pure food and drugs act Congress has barred many drugs and foods considered below certain standards, and this bill may rightly be considered in the nature of an amendment to that act. In the *Lottery* cases (188 U. S. 321) it was held that—

> It is equally within the power of Congress in regulating interstate commerce to protect the public morals as it is to protect the public health or the economic welfare of the people.
>
> Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles. Congress may itself determine means appropriate to this purpose, and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect. (*McDermott* v. *Wisconsin*, 228 U. S. 115.)

Other cases on the subject are: *Hoke* v. *U. S.*, 227 U. S. 308; *Eckmann Alterative* cases, 239 U. S. 510; *Hebe Milk* case, 248 U. S. 297.

STATE LEGISLATION

Eleven States now have laws either prohibiting entirely the manufacture and sale of filled milk or restricting the business in such a way as to make the commercial exploitation impossible. These States are: Utah, Maryland, Florida, California, Colorado, Connecticut, Oregon, Ohio, New York, New Jersey, Wisconsin. In Ohio, Maryland, and Wisconsin the legislation has been upheld by Supreme Court decisions. The Wisconsin decision is the latest, and may be found in the hearings.

ECONOMIC CONSIDERATIONS

The manufacturers of filled milk frankly claim that the business is in its infancy. It is reasonable to assume that in the absence of State legislation and campaigns of education conducted in respect to the compound, its sale now would run into the hundreds of millions of pounds per year. No doubt more filled milk has been manufactured in this country than has been officially reported. It appears that during the present year a large manufacturer of evaporated milk in New York put out vast quantities of filled milk intended for domestic consumption labeled as "evaporated." Our attention has been called to a shipment of 3,000 cases of milk to New York, intended for export, labeled as "evaporated," which was found on chemical analysis in Germany, where part of it was shipped, to be "filled." Some 30 years ago our export trade

in cheese was ruined by the manufacture in this country of "filled cheese," and we are in danger of having suspicion cast on our large exports of evaporated and condensed milk by what is now a comparatively small amount of filled milk. When we consider that in 1918 we exported 551,000,000 pounds of evaporated and condensed milk, of a value of $72,000,000; that in 1919 we made over two billion pounds, exported about 850,000,000 pounds, of a value of $121,000,000; that in 1920 we made about a billion and a half pounds and exported over 400,000,000 pounds, of a value of $65,000,000, we can not afford to let a few manufacturers in this country for an additional profit to them strike a blow which will do irreparable injury to our entire dairying industry. Dairying represents the highest point reached in farm economy. Wherever dairying is extensively practiced, the entire community reflects its benefits.

The National Agricultural Conference called in Washington at the instance of President Harding January 23 to 27, 1922, passed resolutions couched in the following language:

> The manufacture, sale, and use as food of compounds, consisting of milk from which the butterfat has been taken and oriental vegetable oils substituted therefor, is a growing menace to the public health and threatens to undermine the dairy industry of the United States. Investigations have shown that the pure food and drugs act does not give the public the necessary protection against these compounds, and that additional Federal and State legislation is desirable. We therefore urge the enactment of a Federal law to prohibit the introduction

> into interstate commerce of compounds of vegetable oils and skimmed milk, or products made in the semblance of milk. We further urge the passage by the various States of additional legislation prohibiting the manufacture or sale of such imitation compounds, and close cooperation between Federal and State enforcement authorities in the detection and prosecution of violators of such laws.

Dr. William G. Geis, head of the department of biological chemistry, of the College of Physicians and Surgeons, Columbia University, New York City, when legislation for prohibiting the sale of filled milk was before the New York Legislature, made the following statement:

> I am in favor of prohibiting the manufacture and sale of filled milk. There is no economic necessity in our country for this imitation and debasement of pure evaporated milk. There is a biological function of butter fat which can not be supplied by any vegetable fat in combination with skimmed milk. The growth of their bodies, the quality of their teeth, and the health of the children depend largely upon the milk in the diet. There is no evidence of any satisfactory substitute. There is every evidence against this invasion of cheap vegetable fat.

The civilization of our country is dependent upon the dairying industry. We should do everything possible to encourage it. We need it to preserve the fertility of our soil, and the time to prohibit the filled-milk traffic is now, before it has done greater damage to our health or to one of our basic and indispensable industries.

APPENDIX B

State Legislation

The following states, thirty-eight in number, have enacted laws prohibiting or regulating the sale of filled milk. Generally speaking, the laws in question are of three kinds: (1) Laws which specifically prohibit the manufacture and sale of filled milk. Thirty-one states have or have had statutes of this kind. (2) Laws which prescribe standards for condensed milk which outlaw filled milk. There are three states the laws of which fall in this category. (3) Laws which impose conditions and regulations upon the manufacture and sale of filled milk. There are three such statutes listed.

In addition to the statutes referred to below, each of the states and the United States have statutes which make it unlawful to adulterate milk or to add any foreign substance to milk.

ALABAMA

Section 51, Art. 8, Agricultural Code, 1927, makes unlawful the manufacture and sale of filled milk.

ARIZONA

The manufacture and sale of filled milk has been made illegal since 1931, Sec. 943Y, Revised Code 1931; L., 1931, c. 82, Sec. 41.

ARKANSAS

In 1925 an act was approved making it unlawful to manufacture or sell filled milk, Act of March

21, 1925, Sec. 1; Crawford and Moses Digest, 1927, sec. 4827–A; Pope's Digest, 1937, sec. 3103.

CALIFORNIA

The manufacture and sale of filled milk has been illegal since 1919. The law in its present form was approved in 1931 and has never been declared invalid. Agricultural Code, sec. 476, statutes and amendments to codes 1933, p. 134; Codes, laws, etc. (Deering), 1933 Supp., Title 149, Act 1943, p. 1302, and see amendment, same reference, sec. 476, p. 881.

COLORADO

In 1921 Colorado adopted a law providing certain standards for condensed milk manufactured or sold in that state. L. 1921, Act of April 5, 1921, c. 97, sec. 10, p. 250.

CONNECTICUT

Sec. 2487, c. 135, General Statutes, 1930, makes the manufacture and sale of filled milk illegal; Act of May 23, 1923, c. 188, p. 3611.

DELAWARE

Sec. 649, Revised Code, 1935, prohibits the manufacture and sale of filled milk.

FLORIDA

Sections 3216 and 7676, Compiled General Laws, 1927, prescribed certain standards for condensed milk manufactured or sold within that sate. L. 1911, c. 6203, secs. 2, 3.

GEORGIA

The sale of filled milk is made unlawful by Section 42–511, Geo. Code, 1933; L. 1929, Act of August 28, 1929, pt. 1, Title 7, sec. 10, p. 287.

IDAHO

The manufacture and sale of filled milk is made illegal by c. 36, secs. 502–504, 1932 Code; L. 1923, Act of February 21, 1923, c. 37, p. 43.

ILLINOIS

Section 19–A of c. 56½ of Smith-Hurd Annotated Statutes, approved in 1923, prohibits the manufacture and sale of filled milk. This statute was declared unconstitutional in 1931 in the case of *People* v. *Carolene Products Company,* 345 Ill. 156. In 1935 the Filled Milk Law was amended by adding sec. 19–E, to again prohibit the manufacture and sale of filled milk. This amendment was held unconstitutional in December 1936, in the case of *Carolene Products Company* v. *McLaughlin,* 365 Ill. 62. See Cahill's Ill. Revised Statutes, Act of June 21, 1923, c. 56b, sec. 19 (1), p. 1466 and Amendment, Act of July 19, 1935. See Jones Ill. Statute Annotated, 1936 Supp., c. 53, sec. 20 (1), (2), (3), i. e., 53.020 (1), (2), (3).

INDIANA

In 1925 this state adopted a statute making illegal the manufacture and sale of filled milk. Burns Statutes 1926, sec. 3657. This Act was repealed in 1929, c. 212, p. 8, and a tax imposed upon a sale of filled milk, Burns Statutes, 1933, Secs. 35–1320, 1; L. 1929, c. 212, sec. 2, p. 717.

IOWA

Sec. 3062 of the 1935 Code prohibits the manufacture and sale of filled milk. Act of March 28, 1923, c. 44, sec. 1, 2, 3, and 4, p. 43.

KANSAS

The manufacture and sale of filled milk is made illegal by c. 65, sec. 707, General Statutes, 1935. Act of March 31, 1927, c. 242, sec. 8; See also Revised Statutes 1923, 65–713.

MARYLAND

Sec. 281 of the Annotated Code imposes restrictions upon the manufacture and sale of evaporated milk in Maryland which would make it unlawful for the respondent to manufacture or sell its products in that state. This law was approved in 1900 and was held valid in the year 1909—*Reiter* v. *State,* 109 Md. 235; 71 Atl. 975. See Act of April 7, 1900, c. 459, sec. 138, c and d.

MASSACHUSETTS

The Act of March 23, 1923, c. 170, p. 157 makes it unlawful to manufacture or sell filled milk made by adding fat or oil other than butter fat. It was held in *Carolene Products Company* v. *Mahoney,* 294 Fed. 902, 2 F. (2d) 366, that the statute did not apply to "Carolene" which was then a mixture of skimmed milk and egg yolk. "Carolene" is now a mixture of skimmed milk and cocoanut oil and within the prohibition of the act. See sec. 17–A, c. 94, Annotated Laws, 1923.

MICHIGAN

The manufacture and sale of filled milk was prohibited by Sec. 5358, Compiled Laws, 1929. This statute passed in 1923 was in full force and effect until 1936 when it was declared unconstitutional by the Michigan Supreme Court in the case of *Carolene Products Company* v. *Thompson,* 276 Mich. 172; 267 N. W. 608. L. 1923, Act of April 6, 1923, Public Act No. 23, p. 43.

MINNESOTA

In 1923 Minnesota adopted a statute making it unlawful to manufacture or sell filled milk. Mason's Statute 1927, sec. 3926; L. 1923, c. 126, sec. 1; Amended, 1925, c. 203.

MISSOURI

The manufacture and sale of filled milk is prohibited by sections 12408 to 12413, Revised Statutes, 1929. This Filled Milk Law was approved in 1923 and has been in full force and effect since that time. On February 15, 1936, in the case of *Poole and Creber Market Co.* v. *Breshears, Commissioner of Agriculture,* in the Circuit Court of Cole County, the court held the Missouri Filled Milk Law constitutional.

MONTANA

Revised Code, Anderson and McFarland, 1935, c. 240, sec. 2620.39 makes the manufacture and sale of filled milk unlawful. L. 1929, Act of March 11, 1929, c. 93, sec. 34, p. 170.

NEBRASKA

Sec. 81–1022, Compiled Statutes, 1929, approved in 1923, makes the sale and manufacture of filled milk unlawful in the state of Nebraska. This statute was in full force and effect until 1936, when the Supreme Court of Nebraska in the case of *Carolene Products Company* v. *Banning,* 131 Neb. 429; 268 N. W. 313, held the law unconstitutional.

NEW HAMPSHIRE

The manufacture and sale of filled milk in N. H. has been prohibited since 1923, Act of April 12, 1923, c. 36, sec. 2; Public Laws of N. H. 1926, Vol. 1, c. 163, sec. 37, p. 619.

NEW JERSEY

In 1922 N. J. adopted a statute prohibiting the manufacture and sale of filled milk. Compiled Statutes, 1911–1924, sec. 8I–8j, p. 1400; L. 1922, Act of March 11, 1922, c. 110, sec. 3, pp. 198, 199.

NEW MEXICO

Sec. 125–104, 108 Annotated Statutes, 1929, approved in 1927, probably makes the sale of filled milk unlawful. L. 1927, Act of March 14, 1927, c. 97, sec. 4, 8.

NEW YORK

The manufacture and sale of filled milk in New York is made unlawful by sec. 60, c. 1, Cahill's Consolidated Laws, 1930; L. 1922, Act of March 30, 1922, c. 365, sec. 64 (3).

NORTH DAKOTA

In 1925 a law was approved prohibiting the manufacture and sale of filled milk. See Compiled Laws 1913–1925, c. 38, sec. 2855 (a) 1; L. 1925, Act of March 6, 1925, c. 3, sec. 1, p. 9.

OHIO

Sec. 12725, Page's General Code imposes certain restrictions on the sale and manufacture of condensed milk which makes it unlawful for the respondent to do business or sell its products in that state. This statute has been in full force and effect since 1915. In 1919 the statute was held to be constitutional and to prohibit the manufacture and sale of filled milk, *Hebe Company* v. *Shaw,* 248 U. S. 297.

OREGON

The manufacture and sale of filled milk is not entirely prohibited in this state, but very strict regulations are imposed by the 1930 Code, Vol. 2, c. XII, sec. 41–1208–1210, p. 3281; L. 1921, Act of February 26, 1921, c. 372, sec. 1–3.

PENNSYLVANIA

Sections 553 and 582, Title 31, Purdon's Statutes, 1936, makes unlawful the manufacture and sale of filled milk. These statutes were adopted in 1923 and were held constitutional by the Supreme Court of Pennsylvania in *Carolene Products Company* v. *Harter, Director of the Bureau of Foods,* not yet reported. L. 1923, Act of June 29, 1923, No. 361, p. 929.

SOUTH DAKOTA

In 1923 an act was approved making it unlawful to manufacture or sell filled milk; Compiled Laws, 1929, c. 192, sec. 7626–O, p. 2493; L. 1923, Act of March 12, 1923, c. 192, sec. 1, p. 177.

TENNESSEE

The manufacture and sale of filled milk has been prohibited since 1923. Williams Code, 1934, c. 15, sec. 6549, 6551; L. 1923, Act of March 31, 1923, c. 88, sec. 2–4, p. 331.

TEXAS

In 1935 there was adopted a statute prohibiting the manufacture and sale of filled milk. L. 1935, Act of May 17, 1935, Vol. 1, c. 310, p. 717; Vernon's Penal Code, Title 12, c. 2, Art. 713 (a), pp. 20, 21.

UTAH

Sec. 3–10–59.60, Revised Statutes, 1933, approved in 1921, imposes certain conditions upon the manufacture and sale of filled milk. L. 1921, Act of March 22, 1921, c. 45, sec. 1–3, p. 119.

VERMONT

The Act of February 10, 1925, No. 104, L. 1925, p. 142, prohibits the manufacture and sale of filled milk. Public Laws 1933, Title 34, c. 303, sec. 7724, p. 1288.

VIRGINIA

Section 1197–C. 1930 Code, prohibits the manufacture and sale of filled milk. Laws 1924, Act of February 5, 1924, c. 7, p. 7.

WASHINGTON

The manufacture and sale of filled milk is subject to strict regulations and conditions in this state and cannot be purchased by or used in institutions which receive any support from the state. Remington's Revised Statutes, Vol. 7, Title 40, c. 13, sec. 6206, 07, 13, and 14, p. 360. Laws 1919, Act of March 20, 1919, c. 192, sec. 44, 45, 51, 52, p. 636.

WEST VIRGINIA

The manufacture and sale of filled milk is prohibited by section 2036, 1932 Code. L. 1923, Act of April 26, 1923, c. 56, sec. 30, p. 183.

WISCONSIN

In 1921 this state adopted a law prohibiting the manufacture and sale of filled milk which was held constitutional by the Supreme Court of Wisconsin in 1922, in the case of *State* v. *Emery*, 178 Wisc. 147; 189 N. W. 564. Wisc. Statutes, 11th Ed. 1931, c. 98, sec. 98.07, p. 606, L. 1921, Act of June 21, 1921, c. 409.

U. S. GOVERNMENT PRINTING OFFICE: 1939